

5 Official Opinions of the Compliance Board 14 (2006)

**MINUTES – PUBLIC ACCESS – REQUESTOR NEED NOT
INVOKE PIA – MINUTES – PROCEDURE – FAILURE TO
ADOPT IN TIMELY MANNER VIOLATED ACT – CLOSED
SESSION PROCEDURES – WRITTEN STATEMENT –
MERELY REITERATING STATUTORY AUTHORITY
VIOLATED ACT – OPEN SESSION REQUIREMENT –
DISCUSSION BY QUORUM OF BODY FOLLOWING
ADJOURNMENT VIOLATED ACT – COMPLIANCE BOARD
– AUTHORITY AND PROCEDURES – FAILURE OF BODY
TO PRODUCE DOCUMENTATION REQUESTED BY
COMPLIANCE BOARD VIOLATED ACT**

March 24, 2006

Mr. Daniel B. Worth

The Open Meetings Compliance Board has considered your complaint alleging multiple violations of the Open Meetings Act by the Centreville Town Council. For the reasons stated below, the Compliance Board concludes that the Council's practices resulted in numerous violations of the Act.

I

Complaint and Response

The complaint alleged that the Centreville Town Council failed to produce minutes for ten identified work sessions that occurred over an eight-month period, from May through December 2005. According to the complaint, minutes for the regular meetings of the Council were available, but you were told that minutes of work sessions were unavailable "due to a shortage of staff."¹ The complaint also alleged that minutes were unavailable for two public hearings: on June 15, 2005, when the Council considered adoption of a property tax rate for the 2007 fiscal year that exceeded the constant yield rate; and on June 23, 2005, when a hearing was held on the Town's proposed budget.

¹ The ten work sessions identified in the complaint were on the following dates in 2005: May 23, June 13 and 20, August 1 and 29, October 5 and 19, November 2 and 30, and December 14. The complaint suggested the same failure to prepare minutes had occurred for other work sessions as well, but the dates of these were unknown.

In addition, the complaint alleged that the Council failed to provide adequate written information, both in its statements completed in advance of closing meetings and in minutes of its public meetings.² With one exception (February 17, 2005), the Council apparently never approved minutes for the identified closed meetings, leading to the inference that these minutes do not exist. Finally, the complaint alleged that on September 12, 2005, after a public session had ended, a quorum of the Council privately discussed with the Sheriff a proposal for a “virtual weight station,” the matter that the complainant and others had attended the public meeting to hear discussed.³

In a timely response on behalf of the Council, Stephen H. Kehoe, the Town’s attorney, addressed the allegations in the complaint. The response noted that, pursuant to § 10-613 of the State Government Article, the Town requires persons seeking public records to submit a request in writing, using a form available from the Town. However, the Town has no record of ever having received a request pursuant to the Public Information Act for copies of the minutes identified in the complaint.

As to the preparation and availability of minutes of the Council’s work sessions, the Council acknowledged that, as pointed out in the complaint, the Town has had difficulty completing these records due to a shortage of staff. The Council also noted that it has budgeted for additional clerical staff in order to meet the needs of the public in a more efficient manner. Included with the response were a summary of the closed session held on May 19 and minutes of Council work sessions on May 23, October 5, November 3, December 7 and 14. The Council included copies of its minutes from the public hearings held on June 16 and 23, 2005. The Council indicated that summaries of additional closed sessions are now available, although copies were not provided with its response. The Council noted that there was no work session on October 19 as suggested in the complaint; however, a work session was held on October 18. The Council also included copies of a series of agendas for closed sessions and work sessions between May 19 and December 7, 2005. The

² The dates related to these alleged violations were January 6 and 20, February 3, 14, and 17, March 2 and 3, April 25, May 19, June 16, July 14, September 12, and November 3, 2005, and January 5, 2006.

³ The complaint also alleged that the Council failed, in its agendas, to provide adequate disclosure concerning the subjects of certain meetings. Because the Open Meetings Act does not require a public body to make an agenda available in advance of a meeting, the Council’s practice could not have violated the Act. Thus, in submitting the complaint to the Council for a response, we advised the Council that it need not address this aspect of the complaint. However, as discussed in Part III below, it appears that the information provided as part of the agenda is the sole documentation completed in advance of a closed session and is intended to satisfy the disclosure requirements that are part of the Act.

Council acknowledged that its practice has been inconsistent as to the disclosure about a closed session in the next open session minutes, as required by § 10-509(c)(2).⁴ However, it noted that corrective measures to comply with this requirement will be taken to ensure future compliance.

As to the September 12 discussion between two Council members and the Sheriff, the Council noted that this discussion was “informal” and that “no further business was conducted.” According to the response, “this conversation occurred immediately after an open meeting and was done in plain view of the members of the public who had assembled for the public hearing (and apparently recorded).” The conversation “did not occur surreptitiously, nor was it intended to circumvent the purpose of the Open Meetings Act.”

II

Minutes

A. Public Access

The Open Meetings Act provides that:

Except as provided in [§ 10-509(c)], minutes of a public body are public records and shall be open to public inspection during ordinary business hours.

§10-509(d). The “minutes of a public body” become such only after the public body has an opportunity to review a draft and approve them. 3 *Official Opinions of the Open Meetings Compliance Board* 303, 306 (2003) (Opinion 03-10).⁵ However, once approved, minutes of an open meeting are to be available upon request during regular business hours. This right derives from the Open Meetings Act itself. Thus, a person need not invoke the Public Information Act to access minutes of an open session of the public body. Consequently, a public body may not require a member of the public to submit a written request in order to review publicly-available minutes. 3 *OMCB Opinions* 85, 90-91 (2001) (Opinion 01-3). To the extent that the Town did so, its practice violated the Open Meetings Act.

⁴ All statutory references are to the Open Meetings Act, Title 10, Subtitle 5 of the State Government Article, Annotated Code of Maryland.

⁵ For brevity’s sake, we shall henceforth refer to the volumes of our prior opinions as *OMCB Opinions*.

B. Timeliness of Preparation

The Open Meetings Act requires that a public body produce minutes of each meeting conducted under the Act, regardless of whether the meeting is open to the public or closed. § 10-509. As we have previously explained, “[m]inutes are an important element in furthering the General Assembly’s policy declaration that ‘public business be performed in an open and public manner.’ § 10-501(a)(1). Those who were not able to attend an open meeting can at least find out the items considered, actions taken, and votes recorded. § 10-509(c)(1). The information about closed sessions that must be set forth in minutes helps enable the public to hold public bodies accountable for their decisions to close meetings. § 10-509(c)(2).” 4 *OMCB Opinions* 24, 25 (2004).

Minutes are to be prepared “[a]s soon as practicable after a public body meets.” § 10-509(b). No distinction is made between regular meetings of a public body and other meetings that the public body might label as “work sessions.” 3 *OMCB Opinions* 303, 306 (2003) (Opinion 03-10). The salutary effects of minutes are diminished if a public body neglects its obligation to prepare written minutes in a timely manner. 4 *OMCB Opinions* 24, 26 (2004). As a general rule, minutes should become available on a cycle paralleling the public body’s meetings, with only the lag time needed for drafting and review. *Id.* While we have recognized that temporary staff shortages or special circumstances, such as a key employee’s illness, can justify production of minutes later than under a regular schedule, we have also cautioned that a public body may not rely on limited staff time or competing priorities to excuse itself from compliance with the Act. *Id.* (delay of over a year “patently unacceptable.”) *See also* 4 *OMCB Opinions* 1 (2004); 3 *OMCB Opinion* 96 (2001) (Opinion 01-5).

In this case, the Council acknowledged a delay in producing minutes due to limited staff. The Council included with its response minutes of work sessions held on May 23, October 5, November 3 and December 7 and 14. However, each of these documents was marked “DRAFT,” suggesting that, as of the date of the Council’s response, they had not been approved by the body. The failure to adopt minutes for this length of time violated the Act.

The Council also included minutes for hearings held June 16 and 23. However, the Council’s response did not indicate when these documents were produced or whether they were finally adopted by the Council. Thus, as to the latter two sets of minutes, we express no opinion whether they were adopted in a timely manner. *See* § 10-502.5(f)(2).

The complaint also alleged that minutes were unavailable for work sessions held on June 13 and 20, August 1 and 29, and November 30. In submitting the complaint to the Council for a response, we specifically requested that copies of

minutes of closed and public sessions relevant to the complaint be provided with the Council's response. *See* 10-502.5(c)(2)(ii).⁶ The Council's failure to address the availability of minutes for these meetings implies that the minutes do not exist, which is a violation. If in fact they do exist, the Council should have provided them. The failure to do so is a violation. Similarly, the complaint assumed that minutes of closed sessions addressed in the complaint (other than February 17, 2005) do not exist. The failure of the Council to address the availability of such minutes compels the same result.

III

Closed Session Procedures

A. Closing a Meeting

When a public body chooses to close a meeting, the Open Meetings Act imposes certain procedural requirements, including a requirement that the presiding officer complete "a written statement of the reason for closing the meeting, including a citation of the authority under [§10-508], and a listing of the topics to be discussed." § 10-508(d)(2)(ii). Based on the Council's response, we take it that the Council's practice is to rely on notice of a closed session included as part of its agendas as the written statement required in closing a meeting.

As long as the document is available at the time that the public body elects to go into a closed session, nothing precludes preparation of the document in advance. 4 *OMCB Opinions* 46, 48 (2004). In fact, provided the meeting was closed on the basis described in the document, we have previously upheld the practice of including the required documentation as part of an agenda. *Id.* Therefore, the question becomes whether the nature of the disclosure satisfies the requirements of the Act.

⁶ The statute reads:

On request of the [Compliance] Board, the public body shall include with its written response to the complaint a copy of:

- ...
- 2. a written statement made under § 10-508(d)(2)(ii) of this subtitle; and
- 3. minutes ... made by the public body under § 10-509 of this subtitle.

The Compliance Board is required to maintain the confidentiality of minutes sealed by a public body under § 10-509(c)(3)(ii). *See* § 10-502.5(c)(2)(iii).

Someone reading the written statement prepared in advance of a closed session ought to gain an answer to two questions: what does the public body intend to discuss, and why is the topic to be discussed in closed session? *Id.* at 49. Since 1993, we have repeatedly advised public bodies that merely repeating the language of the applicable statutory justification is inadequate. 1 *OMCB Opinions* 23, 25-25 (1993) (Opinion 93-2). As we said then, “[w]hile the Act surely does not require that a public body disclose ... sensitive information that the Act permits to be discussed in closed session, the written statement ought to apprise ... of the basis for the invocation of the particular exception that is cited.” *Id.* at 26. *See also* 4 *OMCB Opinions* 38, 41-42 (2004) (citing prior opinions).

The written statements relied on by the Council were repeatedly inadequate in that they merely parroted the applicable statutory exception. For example, the statement for the closed session conducted on September 12, 2005, stated that: “The Town Council will hold a closed session in the Council Chambers of the Town Hall to discuss personnel matters and pending litigation in accordance with the Maryland Open Meetings Act, State Government Ordinances [sic], Section 10-508(a)(1) and Section 10-508(a)(8).”⁷ Because these statements provided no justification other than repeating the statutory provision, the Council violated the Act.⁸

B. Disclosure Following Closed Session

Following a closed session, the Open Meetings Act requires public disclosure of certain information about the session:

If a public body meets in closed session,
the minutes for its next open session shall
include:

(i) a statement of the time, place,
and purpose of the closed session;

(ii) a record of the vote of each
member as to closing the session;

⁷ In a few instances, the applicable “justification” and statutory reference did not match or was incomplete. See statements concerning the closed sessions of July 25 and August 22, 2005.

⁸ The Compliance Board encourages the Council to use the form recommended by the Attorney General, which is intended to be completed immediately before a closed session, at the time the public body votes to close the meeting. *See* Office of the Maryland Attorney General, *Open Meetings Act Manual App. C* (5th ed. 2004).

(iii) a citation of the authority under [the Act] for closing the session; and

(iv) a listing of the topics of discussion, persons present, and each action taken during the session.

§ 10-509(c)(2). In its response, the Council provided a single example concerning a closed session held on May 19. That session was closed pursuant to § 10-508(a)(1) and (8) and provided sufficient detail to satisfy the Act. According to the Council's response, summaries of closed sessions held on some, but not all, of the other dates listed in the complaint are available. However, because the statements were not provided, we can express no opinion as to their adequacy. Nevertheless, the failure to produce copies of the documents as requested by Compliance Board and the failure to properly document other closed sessions violated the Act. § 10-502.5(c)(2)(ii). *See also 3 OMCB Opinions* 352, 354-55 (2003) (Opinion 03-20) (failure to provide summary of closed session violated the Act).

IV

Discussion Following Adjournment

The final aspect of the complaint related to a discussion between the Sheriff and a quorum of the Council immediately following a public meeting on September 12, 2005.

The Council acknowledged that discussion of a matter of public business involving a quorum of the Council occurred following closure of the public session. We accept the Council's explanation that the post-meeting discussion was not done surreptitiously, nor was it intended to circumvent the Open Meetings Act. Nevertheless, members of a public body must be attentive to the Act's openness mandate when a quorum of the body is present and discussion involves a matter of public business. The public was given the impression that the meeting was completed. Once that happened, further discussion was no longer genuinely open. Perhaps someone who noticed the ongoing discussion and had the initiative to go to the area would have been allowed to listen. But that is insufficient. The public body's responsibility is to ensure openness in practice. The Council's continued discussion under circumstances that precluded an equal opportunity for all to observe violated the Act. *See, e.g., 1 OMCB Opinions* 178, 181 (1996) (Opinion 96-9).

V

Conclusion

The Council's failure to produce or approve minutes for numerous work sessions for an extended period violated the Act. It appears that documents required under the Act, namely minutes of certain closed sessions and work sessions and summaries following closed meetings to be included in publicly-available minutes, simply do not exist – a violation. In other cases, the Council indicated that certain documents relevant to the complaint were on file but did not produce the documents in response to the Compliance Board's request – itself a violation. The summary of a closed session held May 19, 2005, provided by the Council satisfied the disclosure requirements of the Act. Disclosure of the justifications for closing meetings for the period covered by the complaint were inadequate, because they merely parroted the applicable statutory exemption. Finally, continued discussion by a quorum of the Council following apparent conclusion of a public meeting violated the Act.

OPEN MEETINGS COMPLIANCE BOARD

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